

A66 NORTHERN TRANS-PENNINE PROJECT

JOINT POSITION STATEMENT BETWEEN THE APPLICANT AND HISTORIC ENGLAND OUTSTANDING MATTERS RELATING TO THE ENVIRONMENTAL MANAGEMENT PLAN

1. INTRODUCTION

- 1.1 This document responds to a request for information from the Examining Authority (**ExA**) under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) dated 19 May 2023 (**the R17**) [PD-016].
- 1.2 In the R17, the ExA requested an agreed position between the Applicant and Historic England in respect of various outstanding matters relating to the Environment Management Plan (**EMP**) process, primarily as set out in Historic England's Deadline 8 submission: Final Principal Areas of Disagreement Summary Statement [REP8-078].
- 1.3 This document is therefore intended to provide the ExA with a clear understanding of the position of both parties in respect of these matters at the close of Examination.
- 1.4 This document has been agreed by both the Applicant and Historic England and has been submitted into the Examination by both parties at Deadline 9.

2. POSITION OF THE PARTIES

- 2.1 The Applicant and Historic England consider that there has been positive engagement between them throughout the Examination, as recorded in the relevant Statement of Common Ground submitted at Deadline 8 [REP8-024]. In particular, this engagement has resulted in the parties being able to narrow the issues raised in Historic England's Deadline 8 submission to two principal points:
 - 2.1.1 whether any external oversight of the Applicant's internal handling arrangements for post-consent determinations arising under the EMP is required; and
 - 2.1.2 the standard to which archaeological investigations and mitigation works 'carved out' of the definition of "commencement" in article 53 of the DCO are carried out and supervised pursuant to the DCO.
- 2.2 **For the avoidance of doubt, the parties have not been able to reach agreement on these two points. The parties therefore agree that they will need to be determined by the Secretary of State.**
- 2.3 To aid the ExA and the Secretary of State, the parties have summarised their respective positions on these points in the table below.

	Issue	Historic England position	Applicant's response
1.	<p>Whether any external oversight of the Applicant's internal handling arrangements for post-consent determinations arising under the EMP is required.</p>	<p>The Applicant proposes that it will be responsible for post-consent approvals of a number of important documents, including amendments to the second iteration EMP (where the Secretary of State allows the Applicant to do so) and the third iteration EMP. In view of the novel approach being taken to post-consent determinations, it is crucial that the general public, participants in the planning process and, ultimately, the decision-maker, can have confidence in the integrity and transparency of the process.</p> <p>Historic England consider that if it is not possible for the Applicant to set out the proposed handling arrangements at this stage, the arrangements the Applicant does put in the place should be consulted on and approved by the Secretary of State rather than being published by the Applicant. The obligation for consultation to take place should be included in the DCO and reflected in the EMP.</p> <p>Any substantive change in the arrangements for the separation of functions should be excluded from the amendment the Applicant is able to make to the EMP and should be subject to consultation.</p>	<p>The Applicant considers it is not reasonable or practicable for the EMP, established at a specific point in time, to set out the required governance procedures that would need to work effectively and appropriately within the Applicant's wider organisation. It is not therefore possible to set out the exact steps that may be needed to achieve a functionally separate determination (via 'handling arrangements') at this point. Subjecting such arrangements to specific Secretary of State approval would result in a cumbersome, slow and inflexible arrangement running counter to the whole rationale underlying article 53 and the approach being taken to the EMP, and it would also be disproportionate and unprecedented.</p> <p>The Applicant recognises the need to provide clarity on the efficacy of the arrangements, but must retain sufficient flexibility for future organisational change. As such, it has set out in the EMP (section 1.4) defined principles that the handling arrangements at any one particular time must be in accordance with (which are 'secured', as they are captured by the definition of "the consultation and determination provisions" in article 53(12) of the DCO, which cannot be amended without amendment to the DCO itself).</p>
2.	<p>The standard to which archaeological investigations and mitigation works 'carved out' of the definition of "commencement" in article 53 of the DCO are carried out and supervised</p>	<p>Although the archaeological investigation and mitigation work taking place post-commencement will be controlled with reference to a Heritage Mitigation Strategy, the draft DCO and EMP allows archaeological investigations and mitigation works to be undertaken without triggering commencement and does not specify the standard to which these works will be carried out.</p> <p>There are a significant number of scheduled monuments which could be affected by pre-commencement archaeological investigations.</p>	<p>The exclusion of pre-commencement archaeological investigations and mitigation works from the requirement of the Heritage Mitigation Strategy being in place has been accepted on a number of DCOs, and will give the Applicant flexibility to carry out pre-commencement works ahead of the start of the main works (which could streamline the programming of works, reducing disruption). Any main works that could have an impact on cultural heritage receptors could not be carried out without a second iteration EMP being in place, and therefore the Heritage Mitigation Strategy (as a result of article 53 of the DCO).</p>

	Issue	Historic England position	Applicant's response
	pursuant to the DCO.	Historic England request a change of wording in the DCO to require that any pre-commencement archaeological investigation and mitigation works are carried out to the same standard as works taking place post-commencement.	It would not be in the Applicant's interests to undertake any pre-commencement works that could fetter its ability to comply with subsequent archaeological mitigation obligations contained in a second iteration EMP, in the process of undertaking the main works, as that would introduce the risk that those main works could not be lawfully carried out.

2.4 Notwithstanding the parties' respective positions set out above, in the event that the Secretary of State agrees with Historic England on these points, the parties have **agreed** (on a without prejudice basis from the Applicant's perspective) drafting to address both issues.

2.5 In respect of Issue 1, should the Secretary of State agree with Historic England, the **parties agree** that the following drafting should be added to article 53 as a new paragraphs (12) and (13):

“(12) The undertaker must not make a determination under-

- (a) *a second iteration EMP approved under paragraph (1);*
- (b) *paragraph (6); or*
- (c) *paragraph (10),*

until the arrangements for the undertaker to make such a determination (including details on how the matters contained in paragraph 1.4.48 of the first iteration EMP are to be addressed) have been submitted to and approved in writing by the Secretary of State, following such consultation as the Secretary of State considers to be appropriate.

(13) The undertaker must make any determination under the provisions listed in paragraph (12) in accordance with the arrangements approved under that paragraph unless the Secretary of State subsequently approves alternative arrangements in writing, following such consultation as the Secretary of State considers to be appropriate.”

2.6 In respect of Issue 2, should the Secretary of State agree with Historic England, the **parties agree** that the definition of “commence” in article 53(12) should be amended to the following (amendments underlined and in bold):

*““commence” means beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of archaeological investigations and mitigation works **(but only to the extent undertaken in***

accordance with the guidance documents specified in paragraph B3.3.4 of Annex B3 of the first iteration EMP, ecological surveys and mitigation works, investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment and the temporary display of site notices or advertisements, and “commencement” is to be construed accordingly.”

26 May 2023